Received December 14, 1999
CLERK OF DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL MENEILL, Plaintiff vs. TOWN OF PARADISE VALLEY, An Arizona Town; ELSA LYNCH, A Paradise Valley Municipal Court Judge; MIKE COPPELA, A Paradise Valley Police Officer; JILL KENNEDY, Town Attorney for Paradise Valley; SHERWOOD JOHNSTON, III, Hearing Officer for Paradise Valley; Defendants.	No. CIV 99-0332 PHX RCB O R D E R

Plaintiff Michael McNeill brings this case pursuant to 42 U.S.C. § 1961. Currently before the court is Defendants' motion to dismiss for failure to state a claim. Having carefully considered the arguments of the parties, the court now rules.

I. BACKGROUND

The Town of Paradise Valley uses photo radar as one means to enforce its local traffic ordinances. When a

photo radar unit identifies a vehicle that is moving faster than the flow of traffic, the unit records the vehicle's speed and license plate and photographs the driver. The name of the vehicle owner is obtained from the Arizona Department of Motor Vehicles and a computer generated traffic ticket is mailed to the registered owner at the address appearing on the registration. The alleged violation is a civil traffic violation. See Ariz. Rev. Stat. § 28-121 (B) (1998). If the vehicle owner wishes to contest the alleged violation, he or she must appear in Muncipal Court of Paradise Valley and offer eveidence to rebut the allegation that he was the offending driver. Upon a determination that the offending driver is not the registered owner of the vehicle, the ticket is dismissed.

On approximately September 27, 1997, Plaintiff, as the registered owner of an allegedly speeding vehicle, received a computer-generated photo radar traffic ticket in the mail. Plaintiff moved to dismiss the citation because he claimed he was neither driving nor occupying the car at the time of the alleged violation. Subsequently, Plaintiff received a summons to appear in the Muncipal Court of Paradise Valley on February 23, 1998. To contest the ticket.

Plaintiff traveled from South Carolina to comply with the summons. Upon arriving at the courthouse, Plaintiff filed two motions to dismiss, one contesting the court's jurisdiction over photo radar tickets and the other claiming that Paradise Valley officials lacked probable cause to issue the citation. Plaintiff argued that the vehicle registration information on an allegedly speeding car is not sufficiently linked to the identity of the driver to justify issuing the owner a citation by mail. The court did not rule on either of Plaintiff's motion, but dismissed the case on motion from the Town Attorney.

On February 22, 1999, Plaintiff, proceeding pro se, commenced the instant action against Defendants

Sherwood Johnson, III, a hearing officer; Elsa Lynch, a muncipal court jusdge; Jill Kennedy, an attorney for Paradise Valley; Mike Coppela, a police officer; and the Town of Paradise Valley, Plaintiff named all individual defendants in their personal capacities. Defendants have moved to dismiss both Plaintiff's Complaint and Amended Complaint under Fed. R. Civ. P. 12(b) (6). Plaiantiff's motion for a temporary restraining order against Defendant Town of Paradise Valley to enjoin it from issuing photo radar complaints was denied by this court on July 25, 1999.

II. DISCUSSION

A. Scope of the Action

Defendats argue that the court should not entertain Plaintiff's Amended Complaint on the grounds that it would be an exercise in futility. Futility of amendment is a factor in determining the propriety of granting leave to amend. See Loehr v. Ventura County Community College Dist., 743 F. 2d 1310, 1319 (9th Cir. 1984). Here Plaintiff does not require leave to amend, as he is entitled to amend his Complaint "once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). It is well established that a motion to dismiss does not constitute a response to a pleading. Therefore, Plaintiff's Amended Complaint was properly filed and now controls the action.

Plaintiff raised several claims against Defendants in his initial Complaint that he abandoned in his Amended Complaint, including obstruction of justice, violation of public policy, abuse of process, assault, conspiracy, invasion of privacy, negligence and "evil minds and outrageous conduct." An amendment to the complaint under Rule 15 (a) is the appropriate mechanism by which a plaiantiff may eliminate one or more claims among several from the original complaint. See Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988) (citing

Moore's Federal Pracitce. Because these causes of action were not renewed in the Amended Complaint, they will be deemed eliminated from the action.

B. Standard of Review

Under Rule 12 (b) (6), "dismissal for failure to state a claim is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support which would entitle him to relief.'" Schowngerdt v. General Dynamics Corp., 823 F.2d 1328, 1332 (9th Cir. 1987) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Thus, in undertaking its analysis, the court must limit its "review to the contents of the complaint, accepting the material factual allegations as true and construing them in
light most favorable to the {non-movant}." Id. Moreover, pro se complaints must be liverally construed, especially in civil rights cases. See Ferdik v. Bonzelet, F. 2d 1258, 1261 (9th Cir. 1992).

C. Plaintiff's § 1983 Claims

Plaintiff alleges that Defendats' use and administration of a photo radar triffic citation system biolated his civil rights as protected by the Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments of the Constitution.

Plaintiff alleges that he suffered a deprivation of his Fifth and Fourteenth Amendment rights when Defendant Johnston, in his role as a hearing officer for the Municipal Court of Paradise Valley, entered a plea of "not responsible" instead of a plea of "not guilty" on behalf of Plaintiff. Plaintiff claims that but for this erroneous entry he would not have had to appear at the February 23, 1998, hearing. The court finds that Defendant Johnston performed a "judge-like function" in entering a plea on behalf of Plaintiff. "Judges and those performing judge-like functions are absolutely free from liability for damages for acts performed in their official capacities." Ashelman v.

Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). Plaintiff has to recourse against Defendant Johnston because hearing officers are covered by judicial immunity. Plaintiff's § 1983 claim against Defendant Johnston will be dismissed.

Plaintiff further alleges that Defendant Lynch, the municiapl court judge who presided over the proceeding to challenge the citation, violated her constitutional rights in not allowing him to argue before the court. Plaintiff also claims that Defendant Lynch ordered police officers to escort him out of the courtroom, and subsequently, out of the courthouse when he requested a copy of the record from the clerk of the court after the proceedings.

The court finds that Defendant Lynch also stands under the cover of judicial immunity because she acted in her official capacity as a muncipal court judge. "Judicial immunity applies no matteer how 'erroneous the act may have been, and however injurious in its consequences it may have proved to plaintiff.'" Id. At 1075-76 (citing Cleavinger v. Saxner, 474 U.S. 193 (1985)). If Lynch's actions were improper -- which this court is unable to countenance even under a liberal reading of Plaintiff's Complaint -- she remains protected from suit. The court will dismiss Plaintiff's § 1983 claims against Defendant Lynch, as she was well within the purview of her official capacity as a municipal court judge.[1]

---

[1] Plaintiff argues that judicial immunity does not apply in the clear absence of jurisdiction and avers that deficiencies in the traffic Complaint precluded Defendants from gaining jurisdiction over his action. However, the applicable test for determining when a defendant is denied judicial immunity is the "clear absence of all jurisdiction." stump v. sparkman, 435 U.s. 349, 357 (1978) (emphasis added). "(T)he necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." Id. At 356. Municipal courts have .

Plaintiff argues that Defendant Kennedy, the Paradise Valley Town Attorney, violated his constitutional rights by subpoening Plaintiff to testify although no probably cause existed for the issuance of the traffic citation. Plaintiff further argues that compelling him to appear for the purpose of identifying the speeding driver constitutes involuntary servitude in violation of the Thirteenth Amendment. Plaintiff's claim is unavailing, for "[p]rosecutors are also entitled to absolute immunity from section 1983 claims" when acting in their prosecutorial role. Id. At 1075 (citing Imbler v. Pactman. 424 U.S. 409, 427 (1976)). Kennedy's actions were clearly within the scope of Her prosecutorial role for which she is entitled to absolute

Her prosecutorial role for which she is entitled to absolute immunity. Therefore, Plaintiff's § 1983 claim against Defendant Kennedy will be dismissed.

Plaintiff alleges that Defendant Coppela, a Paradise Valley police officer, violated his Fourth Amendment rights actions constitute "assault" and "illegal seizure." Although the court will not "necessaraily assume the truth of legal conclusions merely because they are cast in the form of factual allegations," the court must consider all material allegations as true in ruling on a motion to dismiss. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Defendants argue that Plaintiff merely alleges legal conclusions regarding the actions of Defendant Coppela and assert that qualified immunity shields the officer from these allegations.

"[G]overnmental officials performing discretionary function[s] generally are shielded from liability for civil

---

concurrent jurisdiction over various traffic violations, including speed restrictions. See Ariz. Rev. Sts. § 28-1552 (1998). As officers of a municipal court designated by statute to adjudicate traffic claims, both Defendants Johnson and Lunch had subject matter jurisdiction over Plaintiff's speeding citation

damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In adjudicating a motion to dismiss a § 1983 claim brought against an official performing a discretionary function, the court must determine whether the plaintiff stated that the official violated a constitutional or federal statutory right, see Siegert v. Gilley, 500 U.S. 226, 232 (1991), and whether the right was clearly established, see Anderson v. Creighton, 483 U.S. 635, 640 (1987). "The contours of [a clearly esablished] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id.

Plaintiff indicates that Defendant Coppela violated his Fourth Amendment rights. Although Plaintiff uses legally conclusive assertions, as opposed to factual allegations, to describe Defendant Coppela's conduct, the terms used by Plaintiff suggest factual allegations that the officer used improper physical contact in escorting Plaintiff from the courtroom and courthouse. Moreover, the contours of the right to be free from improper custodial force under the Fourth Amendment are clearly established. Having found Plaintiff's legal assertions suggestive of a potential claim, and in light of his pro se status, the court will grant Plaintiff leave to amend to state specific factual allegations concerning Defendant Coppela's conduct.

In addition to the suggestion of an assault claim, Plaintiff alleges that Defendant Coppela violated Arizona statutory law by certifying the traffic complaint without probably cause that Plaintiff was the photographed driver. Generally, complaints commencing proceedings for municipal violations shall be made under oath. See Ariz. Rev. Stat. § 22-421 (A) (1990 & Supp. 1998). However, traffic

complaints need not be sworn to if the issuing officer certifies that he or she has "reasonable grounds to believe and do[es] believe that the person named [in the complaint] committed the offense or civil violation...." Ariz. Rev. Stat. § 28-1561 (A) (1998). Falsely certifying a traffic complaint constitutes perjury. See Ariz. Rev. Stat. § 28-1561 (B) (1998).

Plaintiff asserts that the nexus between a speeding driver and a registered vehicle owner is questionable and claims that the traffic citation issued to him was not properly certified. The notion of obtaining probable cause before issuing warrants and arrests is clearly defined, and the statutory provision regarding the issuance of civil traffic complaints is equally clear. Being issued a civil complaint without proper certification may constitute a violation of a clearly esablished Fourth Amendment right. But again, Plaintiff has not alleged the requisite factual basis of the claim. It is unclear whether Plaintiff alleges that Defendant Coppela's specific conduct forms the basis of the violation, or conversely, whether he challenges the alleged Town policy of issuing improper certified traffic citations. If Plaintiff seeks only to challenge the overall policy of issuing allegedly improperly certified traffic complaints, he will challenge Defendant Coppela's official capacity, and only Defendant Town will ultimately bear the burden of the claim. See Hafer v. Melo, 502 U.S. 21, 25 (1991) (finding that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent.") Accordingly, the court will grant Plaintiff leave to amend to allege the factual basis of this claim.

Plaintiff alleges that Paradise Valley's use of photo radar is unconstitutional because traffic complaints issue without probable cause to believe that the speeder is the registered owner of the vehicle. Municipalities face liability under § 1983 only when the allegedly violative action is taken pursuant to an official policy or custom. See Monell v.

Department of Soc. Serv. Of New York, 436 U.S. 658, 690-91 (1978).

Plaintiff apparently argues that Defendant Town's policy or custom of issuing traffic citations to vehicle owners without investigating if the owner was in fact the photographed driver vio ates his constitutional rights. Probable cause to issue a traffic citation exists when "the agents know reasonably trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1498 (9th Cir. 1996) (citations ommitted). "Mere suspicion, common rumor, or even *strong reason to suspect* are not enough, however." Id. (emphasis added) (citations ommitted). Here, the liscense plate photographed by the photo radar unit is traced through vehicle registration and driving records to produce the citation against the owner of the vehicle, but it does not appear that Defendant Town's policy or custom requires any further investigation into whether the photographed driver was the vehicle owner before issuing the citation. The court finds the nexus between the vehicle owner and the alleged speeder closer to "a strong suspicion to suspect," rather than reasonable trustworthy information that the speeder was the owner. The court finds Plaintiff has stated a claim against Defendant Town.

In sum, the absolute judicial or prosecutotorial immunity of Defendant's Johnston, Lynch and Kennedy preclude all Plaintiff's § 1983 claims. Plaintifff, however, may be able to establish a § 1983 claim that pierces Defendant Coppela's qualified immunity if he properly alleges the factual basis for his assault and certification claims. The court will grant Plaintiff leave to amend for these purposes. Finally, the material allegations asserted against Defendant Town constitute enough of a challenge to Defendant Town's official policy or custom as to form a

potentially viable claim. After amending, any official-capacity claim against Defendant Coppela will be considered dismissed, as Plaintiff has already asserted a § 1983 claim against Defendant Town.

D. Plaintiff's RICO Claims

Plaintiff asserts that Defendatns have engaged in a pattern of racketeering activity and in a conspiracy to engage in such a pattern in violation of RICO. See 18 U.S. C. § 1962 (c) - (d) (1984 & Supp. 1999). The sole civil action allowable under RICO is intended to remedy an "injur[y] in [claimant's] business or property." Id. At § 1964 (c). Plaintiff alleges that "Defendants obtained Plaintiff's property and caused Plaintiff to suffer extreme monetary losses." (Am. Compl. At 9.)

The traffic citation against Plaintiff was dismissed and the potential civil fine thus constitutes no loss to property. Inasmuch as Plaintiff's complaint can be construed to shape the expenses incurred from his trip from South Carolina into property injury, his claim is barred by Defendants' immunities. Individuals having absolute immunity cannot be sued under RICO. See Cahappell v. Robbins, 73 F3d 918, 922 (9th Cir. 1996) (holding that absolute legislative immunity protected legislators from suits under RICO claims). Thus, just as the absolute immunity of these various individual defendants barred Plaintiff from pursuing claims against them under § 1983, similarly their absolute immunity shields them from suit under RICO as wewll. Accordingly, the RICO claims against Defendants Johnston, Lynch and Kennedy must be dismissed.

Qualified immunity also provides a shield to RICO claims if the accused official did not know that his action violated " 'clearly established' rights conferred on the plaintiffs by the RICO statute." Culligan, 128 F.3d at 312 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The

court finds no "clearly established" rights exist with regard to issuance of photo-radar traffic citations through RICO. As a result, qualified immunity shields Defendant Coppela and the RICO claims against him will be dismissed.

Plaintiff apparently sets forth a civil RICO claim, based upon the predicate act of mail fraud, against Defendant Town. In adjudicating a civil RICO claim based on the predicate act of mail fraud, the Ninth Circuit found that "governmental entities are incapable of forming [the] malicious intent" necessary to support a RICO action. See Lancaster Community Hosp. F. Antelope Valley Hosp., 940 F.2d 397, 404 (9th Cir. 1991); see also Pedrina v. Chun, 97 F.3d 1296, 1300 (9th Cir. 1996) (dismissing civil RICO claim based upon the predicate aacts of bribery, robbery and extortion against a city by citing the Lancaster precedent).

Thus, the court does not find merit to Plaintiff's RICO claims against any individual defendant or against Defendant Town.

IV. Rull 11 Sanctions

Both parties have alleged Rule 11 violations against the other See Fed. R. Civ. P. 11 "Rule 11 provides for the imposition of sanctions when a [pleading or] motion is frivolous, leggally unreasonable, or without factual foundation, or is brough for an improper purpose." Warren v. Guelker, 29 F.3d 1386, 1388 (9th Cir. 1994) (citations ommitted). The court finds the Defendants' motions to dismiss proper and mertorious overall. Thus, Plaintiff's motion for Rule 11 sanctions is not justified.

With respect to the defendants' motion to sanction Plaintiff, while Rule 11 applies to pro se plaintiffs, the Rule is applied less rigorously to parties representing themselves than to lawyers. "[T]he court must also take into account a plaintiff's pro se status when it determines whether the filing was reasonable." Id. At 1390 (citations ommitted). See also Hughes v. Rowe, 449 U.S. 5, 15 (1980) (per curiam).

("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claim."); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaint alleging civil rights violations held to "less stringent standards than formal pleadings drafted by lawyers"); Wood v. McEwen, 644 F.2d 797, 802 (9th Cir. 1981) (while awarding costs and attorney's fees under Fed. R. App. P. 38, Court of Appeals expresses particular reluctance to impose penalties on litigant appearing pro se).

The court finds that, although some of Plaintiff's claims cannot withstand the motion to dismiss, he did not violate Rule 11 (b). It appears that Plaintiff filed suit against Defendants only after inquiring into the relevant law surrounding the photo radar system. While some of Plaintiff's legal conclusions are unsupported or defeated by Defendants' claims of immunity, they are not frivolous or legally unreasonable. Nor does it appear that Plaintiff's purpose in filing the suit was improper (e.g., to harass). Rule 11 sanctions would be inappropriate here, especially considering Plaintiff's pro so status.

IT IS ORDERED granting Defendants' motion to dismiss all Plaintiff's claims not renewed in his Amended Complaint (I.e., obstruction of justice violation of public policy, abuse of process, assault, conspiracy, invasion of privacy, negligence and "evil minds and outrageous conduct") (docs. 7 and 38).

IT IS FURTHER ORDERED granting Defendants' motion to dismiss as to Defendants Johnston, Lynch and Kennedy due to their absolute immunity (docs. 7 and 38).

IT IS FURTHER ORDERED denying Defendants' motion to dismiss as to defendant Coppela, if Plaintiff properly amends to state the factual basis of the claims against the officer (docs. 7 and 38).

IT IS FURTHER ORDERED granting Plaintiff leave

to amend his Complaints to state the factual basis of his claims against Defendant Coppela, provided that it is filed within 20 days of filing this Order.

IT IS FURTHER ORDERED denying Defendants' motion to dismiss as to Defendant Town (docs. 7 and 38).

IT IS FURTHER ORDERED denying Plaintiff's and Defendants' votions for Rule 11 sanctions (docs. 41 and 42).

DATED this 7th day of December, 1999.

/s/ Robert C. Broomfield
United States District Judge

Copies to pro se plaintiff and counsel of record